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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Rhonda Lynn Shreves,

Plaintiff,

vs.

Carolyn W. Colvin,
Commissioner of Social Security,

Defendant.

No. CV-11-8076-PCT (BSB)

ORDER

Plaintiff Rhonda Lynn Shreves (Plaintiff) has filed a Motion for Award of Attorney's Fees Pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. (Doc. 26.) Defendant, the Commissioner of the Social Security Administration (the government), opposes this motion. (Doc. 31.) For the reasons set forth below, the Court grants Plaintiff's motion.

I. Procedural History

On November 22, 2006, Plaintiff applied for Disability Insurance Benefits under Title II and Title XVI of the Social Security Act (the Act), 42 U.S.C. § 401-434, alleging disability with an onset date of August 4, 2002. (Tr. 19.)¹ Plaintiff's application was denied at the initial level of administrative review. After a hearing, on June 23, 2009, an Administrative Law Judge (ALJ) denied Plaintiff's application for benefits finding that she was not disabled within the meaning of the Social Security Act. (Tr. 19-33.) The ALJ's decision became the final decision of the Commissioner of Social Security when

¹ Citations to "Tr." are to the administrative record located at docket 12.

1 the Social Security Appeals Council denied Plaintiff's request for review on March 16,
2 2011. (*Id.* at 1-5.)

3 Plaintiff then brought this action pursuant to 42 U.S.C. § 405(g) for judicial review
4 of the Commissioner's final decision. (Doc. 1.) This Court reversed the decision and
5 remanded the case for further consideration. (Doc. 24.) Thereafter, Plaintiff filed the
6 pending motion requesting an award of \$7,728.51 in attorney's fees under the EAJA.
7 (Doc. 27.) In the Reply in support of her motion, Plaintiff requests an additional \$460.80
8 in attorney's fees for time expended preparing her Reply. (Doc. 32.) Plaintiff also
9 requests that any attorney's fees awarded be paid by a check sent directly to her
10 attorney's office. (Doc. 27.) The government argues that the motion should be denied
11 because it was substantially justified in defending this matter. The government also
12 argues, that unless Plaintiff agrees to waive the requirements of the Anti-Assignment Act,
13 and there is no debt owed by Plaintiff under the Treasury Offset Program, any award of
14 attorney's fees should be paid directly to Plaintiff, not to her attorney. (Doc. 31.)

15 **II. Attorney's Fees under the EAJA**

16 In any action brought by or against the United States, the EAJA provides that "a
17 court shall award to a prevailing party other than the United States fees and other
18 expenses . . . unless the court finds that the position of the United States was *substantially*
19 *justified* or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A)
20 (emphasis added); *see also Thomas v. Peterson*, 841 F.2d 332, 335 (9th Cir. 1988)
21 (stating that the EAJA creates a presumption that fees will be awarded to the prevailing
22 party unless the government establishes that its position was "substantially justified").

23 "Substantially justified means justified in substance or in the main — that is,
24 justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487
25 U.S. 552, 565 (1988) (internal citations omitted). A substantially justified position must
26 have a reasonable basis both in law and fact. *Gutierrez v. Barnhart*, 274 F.3d 1255, 1258
27 (9th Cir. 2001). The Ninth Circuit applies a reasonableness standard in determining
28 whether the government's position was substantially justified for EAJA purposes. *United*

1 *States v. Rubin*, 97 F.3d 373, 375 (9th Cir. 1996); *Flores v. Shalala*, 49 F.3d 562, 569
 2 (9th Cir. 1995). The government bears the burden of establishing that its position was
 3 substantially justified. *Gutierrez*, 274 F.3d at 1258. “The ‘position of the United States’
 4 includes both the government’s litigation position and the underlying agency action
 5 giving rise to the civil action.” *Meier v. Colvin*, 2013 WL 3802382, at *1 (9th Cir. Jul.
 6 23, 2013). The EAJA provides that, “[t]he position of the United States’ means, in
 7 addition to the posture taken by the United States in the civil action, the action or failure
 8 to act by the agency upon which the civil action is based.” 28 U.S.C. § 2412(d)(2)(D).

9 In the Social Security context, the Ninth Circuit treats the ALJ’s decision as the
 10 “action or failure to act by the agency upon which the civil action is based.” *Meier*, 2013
 11 WL 3802382, at *2. Thus, when applying the substantial justification test, the court
 12 determines “(1) whether the [ALJ] was substantially justified in taking [the] original
 13 action, and (2) whether the government was substantially justified in defending the
 14 validity of the action in court.” *Gutierrez*, 274 F.3d at 1258; *see also Meier*, 2013 WL
 15 3802382, at *3 (“Applying the substantial justification test [in the Social Security
 16 context, the court] first consider[s] the underlying agency action, which . . . is the
 17 decision of the ALJ. [The court] then considers the government’s litigation position.”).

18 **III. Analysis**

19 **A. Prevailing Party**

20 The Court must first determine whether Plaintiff qualifies as a prevailing party
 21 under the EAJA. A plaintiff is a prevailing party if he or she succeeds on “any significant
 22 issue that achieves some of the benefit sought in bringing the suit.” *Penrod v. Apfel*, 54
 23 F. Supp. 2d 961, 963 (D. Ariz. 1999) (citing *Tex. State Teachers Ass’n. v. Garland Indep.*
 24 *School Dist.*, 489 U.S. 782, 791-92 (1989)). A claimant who obtains a court order
 25 remanding a Social Security case to the Commissioner either for further proceedings or
 26 for an award of benefits is a prevailing party under the EAJA. *Shalala v. Schaefer*, 509
 27 U.S. 292, 300-01 (1993). Here, the parties do not dispute that Plaintiff is a prevailing
 28 party because the Court remanded this matter to the ALJ for further consideration. *See*

1 *Gutierrez*, 274 F.3d at 1257 (“An applicant for disability benefits becomes a prevailing
2 party for purposes of the EAJA if the denial of benefits is reversed and remanded
3 regardless of whether disability benefits are ultimately awarded.”).

4 **B. Underlying Agency Conduct**

5 The parties disagree as to whether the ALJ’s decision in this case was substantially
6 justified. The Order remanding this case for further proceedings was based on the
7 Court’s conclusion that the ALJ erred at steps four and five of the sequential evaluation
8 process. (Doc. 24 at 20-23.) Specifically, the Court found that the ALJ’s determination
9 that Plaintiff retained the mental residual functional capacity to perform “unskilled work”
10 was not a substitute for the ALJ’s obligation to assess Plaintiff’s degree of functional
11 limitation resulting from her impairment and rendered the ALJ’s decision susceptible to
12 ““overlooking limitations or restrictions that would narrow the ranges and types of work
13 an individual may be able to do.”” (Doc. 24 at 20 (citing Social Security Ruling 96-8p,
14 1996 WL 374184, at *4 (Jul. 2, 1996).)

15 The Court further found that the ALJ erred by applying the Medical-Vocational
16 Guidelines (the grids) without sufficiently explaining their applicability despite record
17 evidence suggesting that the grids may not encompass Plaintiff’s nonexertional
18 limitations. (Doc. 24 at 23.) The Court concluded that because issues remained
19 regarding Plaintiff’s residual functional capacity and her ability to perform other work
20 existing in significant numbers in the national economy, the matter must be remanded to
21 the Commissioner for further administrative proceedings. (*Id.* at 24.)

22 The government argues that implicit in the ALJ’s mental residual functional
23 capacity finding was a finding that Plaintiff could perform all of the mental demands of
24 unskilled work. (Doc. 31.) The government relies on *Bayliss v. Barnhart*, 427 F.3d 1211
25 (9th Cir. 2005), among other cases, to argue that as long as the ALJ took into account
26 Plaintiff’s limitations and discussed how evidence supported the residual function
27 capacity assessment, the ALJ was not required to engage in a function-by-function
28 analysis. As Plaintiff notes, the government essentially reiterates its arguments asserted

1 in its Opposition to Plaintiff's Opening Brief (Doc. 21), but does not explain why the
2 ALJ's position was substantially justified. The Court has already rejected the
3 government's argument that "function-by-function assessments are not always necessary
4 because findings about specific limitations can be implicit" (Doc. 24 at 20-21), because
5 "Social Security Ruling 96-8p requires more than implicit findings" and "mere citation to
6 the regulations does not fulfill the function-by-function and narrative requirements under
7 SSR 96-8p." (*Id.* at 21 (internal citations omitted).) The ALJ found that Plaintiff's
8 mental impairments would "cause mild limitations in her daily living activities, mild
9 restrictions in social functions, and moderate restrictions in her concentration,
10 persistence, or pace." (Tr. 31.) The ALJ, however, did not consider how those
11 restrictions would limit specific work-related functions. Thus, the ALJ did not satisfy his
12 obligations under SSR 96-8p and the government has not met its burden of showing that
13 ALJ's assessment of Plaintiff's mental residual functional capacity was substantially
14 justified.

15 The government agrees that the ALJ's finding that Plaintiff was not disabled was
16 based on the grids. (Doc. 31 at 6.) The government also acknowledges that the grids do
17 not direct a finding of "disabled" or "not disabled" when a claimant suffers from
18 nonexertional limitations that have a material effect on his work abilities. (*Id.* at 7.)
19 Then, the government argues that Plaintiff's nonexertional impairments did not rise to
20 that level. The Court has already found that "[t]he ALJ erred by applying the grids
21 without providing sufficient explanation of their applicability despite record evidence
22 suggesting that the grids may not encompass Plaintiff's nonexertional limitations"
23 (Doc. 24 at 23.) Again, the government does not explain why the ALJ's step-five
24 determination was substantially justified. Therefore, the Court finds that the
25 government's underlying action was not substantially justified in this case.

26 C. Litigation Position

27 Because the government's underlying position was not substantially justified, the
28 Court need not address whether the government's litigation position was justified. *Meier*,

2013 WL 3802382, at *4 (citing *Shafer v. Astrue*, 518 F.3d 1067, 1071 (9th Cir. 2008) (“The government’s position must be substantially justified at each stage of the proceedings.”)). Moreover, even if the Court considered the government’s position in this litigation, the Court would find that it was not substantially justified. *See Sampson v. Chater*, 103 F.3d 918, 922 (9th Cir. 1996) (stating that “[i]t is difficult to imagine any circumstance in which the government’s decision to defend its actions in court would be substantially justified, but the underlying administrative decision would not.”). As Plaintiff points out, the government’s defense of the ALJ’s decision mainly restates its arguments that the Court previously rejected in its order remanding this matter for further proceedings. (Doc. 24.) In view of the errors in the ALJ’s analysis, the Court cannot find that the government was substantially justified in defending the ALJ’s decision in this case. Accordingly, the Court will award Plaintiff attorney’s fees under the EAJA.

IV. Award of Attorney’s Fees

Plaintiff requests attorney’s fees in the amount of \$8,189.31. This amount is based on the following hourly rates and hours worked: (1) 2011, hourly rate \$180.59 and 37.2 hours; and (2) 2012, hourly rate \$183.73 and 5.5 hours. (Doc. 28. Ex. 1.) The fee request also includes 2.5 hours at an hourly rate of \$184.32 for time spent preparing Plaintiff’s reply in 2013. (Doc. 32.) The government does not oppose the amount of fees requested.

Attorney’s fees and expenses under the EAJA must be reasonable. *See* 28 U.S.C. §§ 2412(d)(2)(A). Counsel for the prevailing party has an ethical duty to make a good faith effort to exclude “excessive, redundant, or otherwise unnecessary” hours from counsel’s fee petition. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). The district court has discretion to determine a reasonable fee award. *See* 28 U.S.C. § 2412(b); *Pierce v. Underwood*, 487 U.S. 552, 571 (1988).

The EAJA limits attorney’s fees to \$125.00 per hour “unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceeding involved, justifies a higher fee.” 28 U.S.C.

§ 2412(2)(d)(A). The Supreme Court has suggested that an increase based on the cost of living is “next to automatic.” *Meyer v. Sullivan*, 958 F.2d 1029, 1035 n.9 (11th Cir. 1992) (quoting *Pierce*, 487 U.S. at 571 (1988)). The cost of living adjustment is determined by multiplying the base EAJA rate (\$125.00) by the current Consumer Price Index for all Urban Consumers (CPI-U) and then dividing the product by the CPI-U in the month that the cap was imposed (\$155.70). *See Sorenson v. Mink*, 239 F.3d 1140, 1148 (9th Cir. 2001) (citing *Ramon-Sepulveda v. INS*, 863 F.2d 1458, 1463) (9th Cir. 1988)). Plaintiff has calculated the attorney’s fees award based on hourly rates that are slightly less than or equal to the statutory maximum hourly rate under the EAJA. *See* ‘Statutory Maximum Rates Under the Equal Access to Justice Act,’ available at http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000039 (last visited Aug. 6, 2013).² Additionally, the Court finds that counsel expended a reasonable number of hours on this matter. Accordingly, the Court awards Plaintiff the requested amount of attorney’s fees, \$8,189.31.

Plaintiff requests that the Court order that “any check be sent to Plaintiff’s counsel’s office.” (Doc. 27.) The government argues that any award of attorney’s fees should be made payable to Plaintiff, not her attorney. (Doc. 31.) In *Astrue v. Ratliff*, 560 U.S. ___, 130 S. Ct. 2521 (2010), the Supreme Court held that EAJA fees are payable to the prevailing party, not his attorney. Although Plaintiff recognizes *Ratliff*’s holding, she states that the fee agreement with counsel provides that any EAJA fees are assigned to Plaintiff’s counsel. Plaintiff states that, “while any EAJA fees are payable to Plaintiff, it is respectfully submitted this Court should order any check sent to Plaintiff’s counsel’s office.” (Doc. 27.) Plaintiff does not request that the check be made payable to her attorney.

As previously stated, the Court in *Ratliff* held that EAJA fees are payable the prevailing party, not his attorney. 130 S. Ct. at 2525. In so holding, the Court noted the

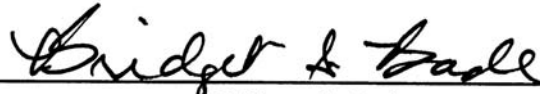
² The applicable statutory maximum hourly rates under the EAJA, adjusted for increases in the cost of living, are as follows: first half of 2013 - \$186.55; 2012 - \$184.32; and 2011 - \$180.59.

1 “practical reality that attorneys are the beneficiaries and, almost always, the ultimate
2 recipients of the fees that the statute awards to the ‘prevailing part[ies]’” because of
3 “nonstatutory (contractual and other assignment-based) rights that typically confer upon
4 the attorney the entitlement to payment of the fees award the statute confers on the
5 prevailing litigant.” *Id.* at 2529 (quoting *Venegas v. Mitchell*, 495 U.S. 82, 86 (1990)).
6 The Court further noted that such “arrangements would be unnecessary if . . . statutory
7 fees language like that in . . . EAJA provide[d] attorneys with a statutory right to direct
8 payment of awards.” *Id.* Thus, although *Ratliff* clarifies that EAJA awards of attorney’s
9 fees are payable directly to the prevailing party, it does not preclude the contractual
10 assignment of the fee award to Plaintiff’s attorney.³ In view of *Ratliff*, the Court declines
11 to order *direct* payment to Plaintiff’s attorney. However, the Court will direct the
12 government to mail the attorney’s fee award, made payable to Plaintiff, to the office of
13 Plaintiff’s attorney.

14 Accordingly,

15 **IT IS ORDERED** that Plaintiff’s Motion for Award of Attorney’s Fees under the
16 Equal Access to Justice Act (Doc. 26) is **GRANTED** and that Plaintiff is awarded
17 \$8,189.31 in attorney’s fees to be mailed (payable to Plaintiff) to Plaintiff’s counsel,
18 Mark Caldwell, Caldwell & Ober, PLLC, 1940 East Camelback Road, Suite 150,
19 Phoenix, Arizona 85016.

20 Dated this 6th day of August, 2013.

21 
22 _____
23 Bridget S. Bade
24 United States Magistrate Judge

25
26 ³ See *Brown v. Astrue*, 271 Fed. Appx. 741, 744 (10th Cir. 2008) (stating that “the
27 private contractual arrangement between [Plaintiff] and his counsel [is] a collateral matter
28 that the [Court] need not address when considering the EAJA fees motion.”).